

JAMES ANTHONY ZYLA,
Plaintiff,
v.
CAROLYN W. COLVIN, Commissioner
of Social Security,¹
Defendant.

No. CV-11-00467-CI
ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 12, 14. Attorney Rebecca Coufal represents James A. Zyla, (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. **ECF No. 17.** After reviewing the administrative record and briefs filed

¹Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to FED. R. CIV. P. 25(d) Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant in this suit. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 by the parties, the court **GRANTS** Defendant's Motion for Summary
2 Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

3 **JURISDICTION**

4 On September 14, 2009, Plaintiff protectively filed a Title II
5 application for a period of disability and disability insurance
6 benefits and a Title XVI application for supplemental security
7 income, alleging disability under both claims beginning July 1,
8 2008. Tr. 13; 208-09. In his application for benefits, Plaintiff
9 reported that he stopped working due to knee problems. Tr. 213.
10 Plaintiff's claim was denied initially and on reconsideration, and
11 he requested a hearing before an administrative law judge (ALJ).
12 Tr. 98-118. A hearing was held on August 4, 2010, which Medical
13 expert Arthur Lorber, M.D., and Plaintiff, who was represented by
14 counsel, testified. Tr. 47-82. ALJ Marie Palachuk presided. Tr.
15 49. The hearing was held open until Plaintiff could obtain and
16 submit existing medical records. Tr. 82. After additional evidence
17 was received, a supplemental hearing was held on October 6, 2010, at
18 which Vocational Expert K. Diane Kramer testified. Tr. 83-97. The
19 ALJ denied benefits on October 29, 2010. Tr. 13-24. The instant
20 matter is before this court pursuant to 42 U.S.C. § 405(g).

21 **STATEMENT OF THE CASE**

22 The facts of the case are set forth in detail in the transcript
23 of proceedings and are briefly summarized here. At the time of the
24 hearing, Plaintiff was 39 years old, he had dropped out of school in
25 the ninth grade, and he later earned a GED. Tr. 63. Plaintiff
26 lived with his girlfriend and her two children in a house. Tr. 81.

27 Plaintiff testified that he experiences problems sleeping at
28 night because he has cramping in his knees. Tr. 75. He said that

1 in the middle of the night, his knees "pop" and awaken him, and then
2 he is up for two hours. He testified that the longest he can sleep
3 at a time is an hour and thirty minutes. Tr. 75.

4 Plaintiff testified that he has had pain in his knees since
5 childhood. Tr. 64-65. He last worked as a telemarketer, and he
6 testified that he was fired from that job because he visited too
7 much, he was "up and down constantly" and his supervisor said he
8 did not get the work done. Tr. 73. Plaintiff also testified that
9 he worked as a security guard, a hotel clerk, and as a journeyman
10 welder. 77-79; 87-89.

11 ADMINISTRATIVE DECISION

12 At step one, ALJ Palachuck found that Plaintiff had not engaged
13 in substantial gainful activity since July 1, 2008. Tr. 15. At
14 step two, she found Plaintiff had the following severe impairments:
15 chondromalacia patella status post arthroscopic surgery of the left
16 knee and mild degenerative changes in the right knee. Tr. 15. At
17 step three, the ALJ determined Plaintiff's impairments, alone and in
18 combination, and even when including his substance abuse/addiction
19 disorder, did not meet or medically equal one of the listed
20 impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R.
21 §§ 416.920(d), 416.925 and 416.926). Tr. 21. The ALJ found
22 Plaintiff has the residual functional capacity ("RFC") to perform

23 [L]ight work as defined in 20 C.F.R. 404.1567(b) and
24 416.967(b). He can lift and carry 20 pounds occasionally
25 and 10 pounds frequently. He can stand and/or walk 2
26 hours in an 8-hour day. He can sit 6 hours in an 8-hour
27 day. He can engage in pushing and/or pulling with the
28 left lower extremity on an occasional basis. He can
occasionally climb ramps or stairs, but never climb
ladders, ropes, or scaffolds. He can frequently engage in
balancing and occasionally engage in stooping, kneeling,
crouching or crawling.

Tr. 21. In step four findings, the ALJ found Plaintiff's statements regarding pain and limitations were not credible to the extent they were inconsistent with the RFC findings. Tr. 21-22. The ALJ found that Plaintiff is capable of performing past relevant work as a hotel clerk and telephone solicitor. Tr. 23.

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in

1 weighing the evidence and making the decision. *Browner v. Secretary*
2 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
3 substantial evidence exists to support the administrative findings,
4 or if conflicting evidence exists that will support a finding of
5 either disability or non-disability, the Commissioner's
6 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
7 1230 (9th Cir. 1987).

8 **SEQUENTIAL PROCESS**

9 The Commissioner has established a five-step sequential
10 evaluation process for determining whether a person is disabled. 20
11 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
12 137, 140-42 (1987). In steps one through four, the burden of proof
13 rests upon the claimant to establish a prima facie case of
14 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
15 This burden is met once a claimant establishes that a physical or
16 mental impairment prevents him from engaging in his previous
17 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
18 claimant cannot do his past relevant work, the ALJ proceeds to step
19 five, and the burden shifts to the Commissioner to show that (1) the
20 claimant can make an adjustment to other work; and (2) specific jobs
21 exist in the national economy which claimant can perform. *Batson v.*
22 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
23 If a claimant cannot make an adjustment to other work in the
24 national economy, a finding of "disabled" is made. 20 C.F.R. §§
25 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

26 **ISSUES**

27 The question presented is whether substantial evidence exists
28 to support the ALJ's decision denying benefits and, if so, whether

1 that decision is based on proper legal standards. Plaintiff
2 contends the ALJ erred by (1) failing to find severe mental
3 impairments at step two; (2) failing to develop the record and order
4 a consultative exam; and (3) by giving no weight to the opinion of
5 John Arnold, Ph.D. ECF No. 13 at 7-10. Defendant responds the
6 ALJ's decision is supported by substantial evidence, additional
7 evidence was not warranted, and her findings are free of legal
8 error. ECF No. 15.

9 DISCUSSION

10 A. Step Two

11 Plaintiff argues the ALJ erred at step two when she found
12 Plaintiff's alleged mental impairments were "non-severe," and the
13 ALJ failed to fully develop the record refusing to order additional
14 testing to ascertain the severity of Plaintiff's mental impairments.
15 ECF No. 13 at 7-8.²

16 To satisfy step two's requirement of a severe impairment, the
17 claimant must prove the existence of a physical or mental impairment
18 by providing medical evidence consisting of signs, symptoms, and
19 laboratory findings; the claimant's own statement of symptoms alone
20 will not suffice. 20 C.F.R. §§ 404.1508, 416.908; *Taylor v.*
21 *Heckler*, 765 F.2d 872, 876 (9th Cir. 1985). The ALJ then determines
22 whether the medically determinable impairment significantly limits
23 the physical or mental ability to do basic work activities. 20
24 C.F.R. §§ 404.1520(c); 416.920(c). The fact that a medically
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26 ²Plaintiff indicates that he "has filed a new claim which is at
27 the hearing level at this time and which alleges primarily mental
28 health problems." ECF No. 13 at 10.

determinable condition exists does not automatically mean the symptoms are "severe," or "disabling" as defined by the Social Security regulations. See, e.g., *Edlund*, 253 F.3d at 1159-60; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985). An impairment may be found to be non-severe when "medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work." SSR 85-28.

In this case, Plaintiff presented scant objective evidence supporting the existence of a mental impairment that could have a material impact on the disability decision. The visits with Dr. Arnold do not establish Plaintiff had a severe mental impairment - the test results were invalid and suggestive of overreporting or other possible problems. Tr. 431. As a result, Plaintiff failed to establish a mental impairment by signs, symptoms, laboratory findings, and instead offered only his own statement of symptoms. The record is insufficient to establish a severe mental impairment.

B. Develop the Record

Plaintiff also contends that the ALJ failed to develop the record, by declining to send Plaintiff for a mental consultative exam. ECF No. 13 at 8-9. An ALJ's duty to develop the record further is triggered "only when there is ambiguous evidence or when the record is inadequate for proper evaluation of evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (citing *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)). To further develop the record, the Commissioner may order consultative examinations at the agency's expense. However, the Commissioner has

1 "broad latitude in ordering a consultative examination." *Diaz v.*
2 *Secretary of Health and Human Services*, 898 F.2d 774, 778 (10th Cir.
3 1990). Consultative exams are purchased to resolve a conflicts or
4 ambiguities "if one exists." 20 C.F.R. § 404.1519a(a)(2). The
5 claimant has the initial burden to raise the issue; i.e.,
6 sufficient objective evidence exists in the record to suggest the
7 "existence of a condition which could have a material impact on the
8 disability decision." *Hawkins v. Chater*, 113 F. 3d 1162, 1167 (10th
9 Cir. 1997).

10 In this case, Plaintiff has failed to carry his burden to
11 initially raise the issue of a severe mental impairment. As
12 discussed above, the record is devoid of objective evidence that
13 could have a material impact on the disability decision. In the
14 absence of such evidence, the ALJ had no duty to order a
15 consultative examination. The ALJ did not err.

16 **C. John Arnold, Ph.D.**

17 Plaintiff argues that the ALJ improperly weighed the medical
18 evidence by failing to give Dr. Arnold's opinion the proper weight.
19 ECF No. 13 at 12-13.

20 In general, more weight should be given to the opinion of a
21 treating doctor than to a non-treating doctor, and more weight to
22 the opinion of an examining doctor than to a non-examining doctor.
23 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where not
24 contradicted by another doctor, a treating or examining doctor's
25 opinion may be rejected only for "clear and convincing reasons."
26 *Id.* at 830-31. An ALJ must set out a detailed and thorough summary
27 of the facts and conflicting evidence, stating his or her
28 interpretation of the facts and evidence, and making findings.

1 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

2 On May 18, 2010, John Arnold, Ph.D., administered the MCMI-III,
3 and Plaintiff's profile was invalid due to overreporting of
4 psychological problems. Tr. 424; 430. On June 9, 2010, Dr.
5 Arnold's chart note indicated rule out ADHD. Tr. 428. On June 15,
6 2010, Dr. Arnold's notes reflect Plaintiff had minimal, if any,
7 symptoms of ADHD. Tr. 430. Dr. Arnold noted several "working
8 diagnoses" as: bipolar II disorder, currently depressed rule out
9 psychotic features, PTSD, late onset, ASPD, rule out ADHD, and rule
10 out somatoform disorder. Tr. 430.

11 On July 13, 2010, Dr. Arnold observed that Plaintiff's test
12 scores did not provide clarity for a diagnosis because the test
13 results were invalid. Tr. 431. Dr. Arnold administered the WRAT-3
14 test, that indicated Plaintiff reads at a seventh grade level,
15 writes at a third grade level and computes math at a sixth grade
16 level. Tr. 431. During that visit, Plaintiff informed Dr. Arnold
17 that he was moving to Texas in August and Dr. Arnold "invited [him]
18 back for counseling until then" Tr. 431. No records of any
19 additional visits are provided.

20 The ALJ noted that Dr. Arnold's diagnoses were inconsistent
21 from visit to visit. Tr. 20-21. Additionally, the ALJ noted Dr.
22 Arnold's diagnosis included rule out attention deficit hyperactivity
23 disorder, despite test results indicating no findings of the
24 disorder. Tr. 21. The ALJ also noted that Dr. Arnold's findings on
25 examination were entitled to no weight because he relied upon
26 Plaintiff's self-reports.

27 Moreover, in evaluating Dr. Arnold's observations based upon
28 Plaintiff's self-reports, the ALJ evaluated Plaintiff's credibility

1 and found him less than fully credible.³ Tr. 22. In this case, Dr.
2 Arnold noted at least one inconsistency related to Plaintiff's
3 report of the cause of his father's death. Tr. 430.⁴ As the ALJ
4 pointed out, in the absence of objective, valid test results, in
5 forming his opinions Dr. Arnold was left to rely largely upon
6 Plaintiff's self-reporting of symptoms. Tr. 21. An ALJ may
7 properly give less weight to diagnoses based on unreliable
8 self-reporting. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
9 2005).

10 The record supports the ALJ's determination that Dr. Arnold's
11 opinions about Plaintiff were entitled to no weight because the
12 records did not reveal an established diagnosis, but instead only
13 "working" or provisional diagnosis. The evidence does not establish
14 Plaintiff suffered from a severe mental impairment.

15 CONCLUSION

16 Having reviewed the record and the ALJ's findings, the court
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18 ³Plaintiff did not challenge the ALJ's credibility
19 determination.

20 ⁴Moreover, the ALJ provided multiple instances of inconsistent
21 statements from Plaintiff, all of which are supported by the record.
22 For example, the ALJ noted that Plaintiff asserted he had never
23 abused drugs or alcohol, and later records indicate he admitted to
24 abuse of both substances. Tr. 23; 386; 418. The record also
25 reveals Plaintiff was untruthful to medical providers about a
26 narcotic medication refill, and when his provider denied him another
27 refill, Plaintiff became belligerent and threatening. Tr. 23; 375;
28 377; 425-26.

1 concludes the ALJ's decision is supported by substantial evidence
2 and is not based on legal error. Accordingly,

3 **IT IS ORDERED:**

4 1. Defendant's Motion for Summary Judgment, **ECF No. 14**, is
5 **GRANTED.**

6 2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is
7 **DENIED.**

8 The District Court Executive is directed to file this Order and
9 provide a copy to counsel for Plaintiff and Defendant. Judgment
10 shall be entered for **DEFENDANT** and the file shall be **CLOSED.**

11 DATED May 24, 2013.

12
13 S/ CYNTHIA IMBROGNO
14 UNITED STATES MAGISTRATE JUDGE
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